

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of Decision: 15-11-1995.

CRIMINAL APPEAL NO. 626 OF 1990

For Approval and Signature:

THE HON'BLE MR. JUSTICE A.N. DIVECHA

And

THE HON'BLE MR. JUSTICE H.R. SHELAT.

1. Whether Reporters of Local Papers may be allowed to see the Judgment ?
2. To be referred to the Reporter or not ?
3. Whether Their Lordships wish to see the fair copy of Judgment ?
4. Whether this case involves substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
5. Whether it is to be circulated to the Civil Judge?

Shri H.M. Chinoy, Advocate for the appellant.

Shri Champaneri, Addl. Public Prosecutor for the respondent State.

Coram: A.N. Divecha, J. & H.R. Shelat, J.
(15-11-1995)

ORAL JUDGMENT: (Per: H.R. Shelat, J.)

The appellant, having been convicted of the offence under Section 20-B of The Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act') and sentenced to rigorous imprisonment of 10 years, and fine of Rs.1,00,000/-, in default to rigorous imprisonment of 9 months more by the then learned Additional Sessions Judge, Baroda on 7-7-1990 in Sessions Case No.10 of 1990, has preferred the present appeal.

2. In short, it is the case of the prosecution that

Jasvindersinh Dharamsinh Ramgadia the then PSI, control room at Baroda came to know that certain persons were bringing narcotic drugs, charas etc., from outside into the city and were selling to the retailers or directly to the people or the students. The police officer then decided to have the raid. The then D.S.P., Mr. Gehlot was informed and summoning panchas Jasvindersing Dharamsinh Ramgadia decided to raid laying the trap. The panchas were made to understand what role they had to play. The raiding party then went near the English Medium School situated in Gujarat Refinery Township of the city of Baroda where the panchas and police personnel were deployed at different places. A bogus customer was sent. He contacted the appellant and was talking about narcotic drug or charas. As the accused appellant showed the charas bringing out the same from his pocket, signal was given and then panchas and police personnel rushed to the place. The appellant was then searched and from his person charas was found. He was having no pass or permit to possess the same or deal with the same. The police officer then found that appellant had committed the offence punishable under Section 20 of the NDPS Act by possessing, without any pass or permit, the charas. On 14th August 1989 at 3.45 hours a complaint was lodged and investigation was taken on hand. During the course of investigation police also found that Gopalsingh Pratapsinh Gurkha had sold the charas to the present appellant, and therefore he was also involved in the matter and against both, the charge-sheet was presented before the then learned Chief Judicial Magistrate at Baroda who committed the case to the Court of Sessions, as he was not in law empowered to hear and decide the matter. The case then came to be registered as Sessions Case No. 10 of 1990 on the record of the Sessions Court at Baroda. The then learned Sessions Judge assigned the case to the then Additional Sessions Judge, Baroda for hearing and disposal in accordance with law. The learned Additional Sessions Judge then framed the charge against both the accused to which both pleaded not guilty and therefore the prosecution led necessary evidence. Considering the evidennce on record, the then learned Judge below acquitted Gopalsinh Pratapsinh Gurkha, but convicted the present appellant and sentenced him as aforesaid and therefore appellant who is convicted, has preferred this appeal.

3. Mr. Chinoy representing the appellant assailed the judgement only on one point going to the root of the matter and it was about the provision of Section 50 of NDPS Act having been overlooked by the investigating authority while making the search. As per that provision, it is incumbent upon the prosecution to inform the citizen that he has a right to have himself searched in the presence of a Gazetted Officer or a Magistrate. Failure to so inform the citizen is fatal. No presumption about the official act can be drawn. The onus cast on an accused under Sec.54 would not even cure the lacuna. For our such view, a reference to the case of Saiyad Mohd. Saiyad

Umar Saiyad & Ors vs. State of Gujarat - [1995 (2)] 36(2) GLR 1315 may be made. When the law about mandatory provision of Section 50 has been accordingly made clear recently by the Supreme Court, the prosecution has to follow the same in letter and spirit, and if there is omission on the part of the investigating authority, the accused will have to be acquitted regardless of other evidence being on record.

4. We, therefore, called upon the learned Additional Public Prosecutor, Mr. Champaneri to point out from the record whether requirements of Section 50 of NDPS Act were satisfied. He took us to the entire evidence on record, but nowhere he was able to point out that mandatory provision of Section 50 was followed and appellant-accused was informed about his right of being searched in the presence of a Gazetted Officer or a Magistrate. When there is nothing on record, we hold that accused-appellant has been deprived of his valuable right available to him in law. When that is so, the conviction and sentence passed by the lower Court cannot be maintained and requires to be quashed. The appeal therefore requires to be allowed. In the result, we allow the appeal, set aside the judgment and order convicting the appellant-accused of the offence under Section 20 of the NDPS Act and acquit him thereof. The appellant-accused be set at liberty forthwith if not required in any other matter.

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